IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO.109 OF 1999
IN
TESTAMENTARY SUIT NO.75 OF 1994
IN
TESTAMENTARY PETITION NO.225 OF 1994

Suresh J. Paleja ....Petitioner
V/s.
Mathuradas J. Paleja ....Respondent

Ms.K.C. Nichani with Mr.N.Z. Khapra for the Petitioner.
Mr.Saam Wassoodew for the Defendant/Caveator.

CORAM : S.J. VAZIFDAR, J.
DATED : 13TH JULY, 2007.

P.C. :

1. This is a Petition for probate. Both the executors have expired during the pendency of this Petition.

2. In view of the judgment of a Division Bench of this Court in the case of - *Thirty Sam Shroff vs. Shiraz Byramji Anklesaria & Anr., 2007 (3), AIR Bom.R. 106 (DB),* the suit does not survive. In paragraphs 30 to 33 of the judgment read as under :-

> 30. Considering all the above decisions, it is abundantly clear that the probate proceeding, though on being contested, becomes contentious proceeding, and therefore, it is to be proceeded in the form of a suit, but that by itself does not transform the

proceeding into a suit under the Code of Civil Procedure. The provisions of Code of Civil Procedure would apply to such proceedings to the extent they are not inconsistent with the provisions of law comprised under the said Act. Section 226 of the said Act specifically provides that in case of Aeath of an executor, representation would survive to the surviving executor or executors, as the case may be. At the same time, Section 222 clearly specifies that the probate can be granted only to an executor. In other words, the probate proceedings are essentially at the instance of the executors so named in the Will, and can survive till the executors survive. Moment the sole executor dies or all the executors die, the question of proceeding being kept alive does not arise at all, as there would be no occasion in such a case to grant any probate. Such a proceeding would die a natural death as a consequence of non survival of any executor. In such circumstances, the question of applicability of Order XXII of the Code of Civil Procedure does not arise at all.

31. Merely because the proceeding may be appearing to be in the form of a representative character in relation to the execution of the Will of the deceased, that by itself will not make the proceeding to be a representative suit within the meaning of the aid expression under the provisions of the Code of Civil Procedure. Order I Rule 8 of the Code of Civil Procedure which deals with the concept of a representative suit speaks of representation of interest of numerous persons and not the numerous interest of same person. Merely because the probate proceedings may relate to numerous properties of the deceased person, having so covered by the Will executed by the deceased person, that will not transform the proceeding into a representative suit within the meaning

> of the said expression as understood under Order I Rule 8 of the Code of Civil Procedure.
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> 32. Once it is clear that the proceeding does not survive on the death of last surviving executor, such proceeding is bound to abate. The question of entertaining any application for substitution in an abated proceeding cannot arise, till and until the abatement is set aside. The question of setting aside the abatement would arise only in a case where right to sue survives and sufficient case is made out by moving the Court to set aside the abatement and to bring the legal representatives on record. Once t is clear that in a probate proceeding, there is no right to sue which can survive, the question of setting aside of the abatement does not arise. Once the abatement cannot be set aside, it means, proceeding cannot be revived. Once a proceeding is dead, the question of entertaining any application therein does not arise. Hence, the contention about the substitution of the deceased executor and thereafter transforming the proceeding into a proceeding for Letters of Administration does not arise.
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> 33. The question of transformation from one form of proceeding into another form of proceeding would arise only when the proceeding in the first form is surviving or pending. In a case where the proceeding itself has abated and is neither surviving nor pending, the question of transforming the same into another form does not arise.

3. In the circumstances, no purpose would be served by adjourning the Notice of Motion to enable any party to take out proceedings for substitution of the Petitioner.

4. In the circumstances, the Notice of Motion is dismissed.